IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 48 of 1998

1. Anant Ramchadnra Ghode
2. Vijay Anant Ghode
3. Sharad Anand Ghode
4. Sou. Sunanda Anant Ghode
5. Mrs. Nalini Mahaveer Desai ...Appellants

(Orig.plaintiffs)

V/s

1. Ajit Adinath ghode
2. Smt.Indumati Adinath Ghode
3. Arvind Adinath Ghode ... Respondents

(Orig.defendants)

Mr.M.K.Nesari for Appellants

Ms A.R.S.Baxi for Respondent no.1.

CORAM:S.R.SATHE,J.

DATED:17th August 2004

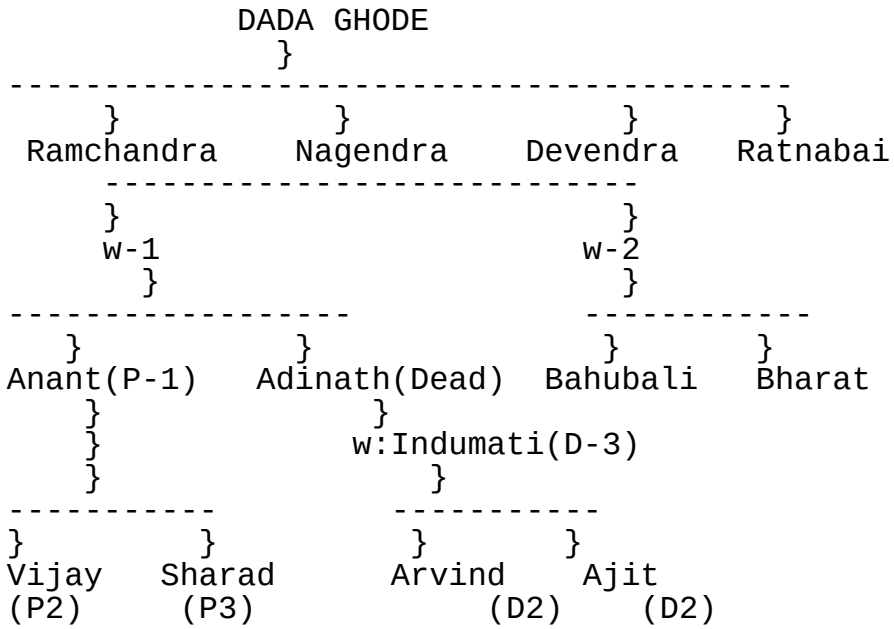
ORAL JUDGMENT :-

1. Being aggrieved by the judgment and order passed by the court of Additional District Judge, Sangli in Regular Civil Appeal No.467 of 1991, whereby the order passed by the Civil Judge, Senior

Division, Sangli in Special Civil Suit No.105 of

1986, directing the defendants to hand over possession of some of the suit properties to the plaintiff was set aside and plaintiffs' suit was dismissed and appeal was allowed and Cross Objection was dismissed, the original plaintiffs have preferred this second appeal. For the sake of convenience hereinafter parties shall be referred to as plaintiffs and defendants.

2. Before pointing out the brief facts relevant to this appeal, it is necessary to set out pedigree showing relations between the parties.



3. House property consisting of 2 storied building bearing C.T.S.No.20, situated at Sangli, was the

self acquired property of Nagendra Dada Ghode. He had no issue. He had love and affection for plaintiff no.1 and deceased Adinath. Plaintiff no.1 and Adinath were residing with Nagendra, however, subsequently the relations between plaintiff no.1 and Adinath became strained and therefore at the instance of Nagendra, Adinath started residing separately on the ground floor of the suit house. Nagendra bequeathed the suit property to Anant i.e. plaintiff no.1 and Adinath by virtue of a Will dated 2-3-1966. Plaintiff no.1 was appointed as an executor of the said Will. Some portion of the suit house was also occupied by Ratnabai, paternal aunt of plaintiff no.1. After the death of Nagendra in the year 1967, plaintiff nos 2 and 3 started disputing the will by contending that Nagendra had no testamentary mind or capacity to bequeath the property and on several other grounds. As per the Will the property described as ABCD and DYXE in Schedule A attached to the plaint was given the plaintiff no.1 while property described as XYFB in Schedule was bequeathed to Adinath. However, both of them were not having possession of the said property as actually bequeathed but some portion allotted to plaintiff no.1 was in actual possession of Adinath, while some portion allotted to Adinath was in possession of others. Hence plaintiff no.1 who was the legatee and Executor of the will sued the heirs

of other legatee along with his sons and wife i.e. defendant nos.1 to 3 for recovery of possession of the property bequeathed to plaintiff no.1 under Will dated 2-3-1966.

4. The defendant no.1 filed his written statement at Exh.18 and opposed the suit claim. The defendant nos. 2 and 3 who are real contesting defendants filed their joint written statement at Exh.19 and contended that suit house bearing C.T.S.No.20 was not the self acquired property of Nagrenda. It was also contended that on 2-3-1966 Nagendra had no disposing state of mind and he has not executed the Will in question. The defendants accordingly challenged the legality and validity of the Will executed by Nagendra and also contended that the suit is not maintainable as the plaintiff had not obtained probate of the said Will. On the pleadings of the parties the trial Court framed as many as 11 issues including the issue to as whether the suit was bad for want of probate of Will in question. After considering the evidence adduced by both the parties, the trial Court came to the conclusion that it was not necessary for the plaintiff to obtain probate of the Will and the suit even in absence of probate is maintainable. He also held that will is legal and valid and plaintiff no.1 is entitled to take possession of some portion of the suit houses. He therefore,

decreed the suit partly and directed the defendants to hand over vacant possession of particular portion of the suit house to plaintiff. Similarly plaintiff was also directed to hand over vacant possession of particular portion to the defendants.

5. Being aggrieved by the said order the original defendant nos.2 and 3 filed Civil Appeal No.467 of 1991. The plaintiff no.1 also filed Cross Objections. After hearing the arguments of both the learned Advocates the first Appellant Court framed as many as 8 points for determination. However, he held that the plaintiff was not entitled to file the present suit as he had not obtained the probate of the Will. He therefore, held that suit was not tenable and as such allowed the appeal and dismissed the plaintiff's suit. The lower appellate Court also dismissed the Cross Objection filed by the plaintiff no.1. It is this order of the lower Appellate Court that is being challenged in this second appeal.

6. From the perusal of the record it appears that this Hon'ble Court on 27-2-1998 admitted the appeal on the following substantial question of law, viz. "Whether the judgment of the First Appellate Court which relied on the judgment in the case of T.Venkata Narayana and others vs. Smt. Venkata Subbamma (Dead) and others reported in A.I.R. 1996

S.C. 1807 can be sustained in the light of Section 213(2)(1) read with Section 57(c) of the Indian Succession Act."

7. Mr.M.K.Nesari, learned Advocate for the Appellants-plaintiffs has submitted that first appellate Court wrongly placed reliance on a case T.Venkata Narayana and others V/s Smt.Venkata Subbamma (Dead) and ors reported in AIR 1996 S.C. 1807, and reached to a wrong conclusion that it was necessary for the plaintiff no.1 to obtain probate of the Will in question. According to him the first appellate Court failed to consider the provisions of Section 213(2)(1) of Indian Succession Act, 1925. As against this, Ms. A.R.S.Baxi, learned Advocate for the defendant no.1 supported the judgment and order passed by the first appellate Court.

8. In order to examine the point in issue, it would be worthwhile to see what sections 57 and 213 of Indian Succession Act, 1925, say -

> Section 57. Application of certain provisions of Part to a class of Wills made by Hindus, etc. The provisions of this Part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply-

a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of September, 1870, within the territories, which at the said date were subject to the Lieutenant Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay,and

(b) to all such Wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; (and)

(c) to all Will and codicils made by any Hindu, Buddist, Sikh or Jain on or after the first day of January, 1927, to which those provisions are not applied by clauses (a) and (b);

Provided that marriage shall not revoke any such Will or codicil.

213. Right as executor or legatee when established - (1) No right as executor of legatee can be established in any Court of justice, unless a Court of competent

jurisdiction in (India) has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

(2) This section shall not apply in the case of Wills made by Muthammadans (or Indian Christians) or and shall only apply

(i) in the case of Wills made by any Hindu, Budhist,Sikh or Jaina where such Wills are of the classes specified in clauses (a) and (b) of section 57, and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (amendment) Act, 1962 (16 of 1962), where such Wills are made within the local limits of the (ordinary original civil jurisdiction) of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immovable property situated within those limits.

. As in the instant case the will is executed on 2-3-1966 by a Jain person at Sangli and in respect

of the suit property situated at Sangli which is admittedly outside the jurisdiction of the Original Civil Jurisdiction of Bombay High Court, It is not necessary for the plaintiff to obtain a probate.

8. Now it is not in dispute that late Nagendra has executed the Will in question. Admtitedly the Will is executed on 2-3-1966 at Sangli and it is in respect of the property situated at Sangli. Admtitedly late Nagendra and present parties are Jain by religion. The main and material question is whether the plaintiff no.1 was entitled to file the present suit in the absence of probate of the Will in question. From perusal of the judgment of the first appellate Court it appears that relying only on authority of the apex Court reported at AIR 1996 SC 1807 the first appellate Court has held that it was necessary to obtain the probate. It would be worthwhile to see the observations made by the apex Court in the said ruling. The same are as follows :-

> "4. The only question is:whether the respondent is entitled to adduce secondary evidence to prove the alleged will said to have been executed by Venkata Subbamma in her favour? The admitted position is that in partition suit, after the Succession Act came into force, namely,August 28, 1969,

> Venkta Subbamma had compromised with her son and obtained a decree with covenants contained therein. What is the effect of that decree is the subject matter in the pending suit. Whatever rights that were available to her there under would be available to the respondent who has come on record a legal representative. The mere suit for injunction cannot be converted into a suit for probation of a will whereat the will is to be proved. If the will is to be proved according to law, it has to be by way of probate in the Court having competency and jurisdiction according to the procedure provided under the Indian Succession Act. That procedure cannot be converted in a suit for mere injunction as a probate suit and direct the parties to adduce evidence, be it primary or secondary evidence as the circumstances may warrant. The High Court has committed error of law and jurisdiction in directing adduction of secondary evidence in the suit for injunction to prove the will alleged to have been executed by Venkata Subbamma.

From the perusal of the entire judgment of the apex Court referred to above, it appears that the observations "if the will is to be proved according

to law, it has to be by way of probate in the Court having competence and jurisdiction according to the procedure provided under the Indian Succession Act" are made in the light of the facts of that matter. It must be noted that in this judgment the apex Court has not discussed the ambit of Section 213 and section 57 of Indian Succession Act. There is absolutely no reference in the judgment to the said Sections. As against this the learned Advocate for the plaintiffs has drawn my attention to a case - Clarence Pais and Ors. V/s Union of India reported in JT 2001(3) SC 82 wherein the apex Court has thoroughly discussed the scope of Section 213(1) of the Act as well as the provisions of Section 57 of Indian Succession Act and have laid down the law as to when the probate is required to be obtained by Hindu in respect of a Will. It is essential to see the exact observations of the apex Court. The apex Court has observed :

> "6. The scope of Section 213(1) of the Act is that it prohibits recognition of rights as an executor or legatee under a Will without production of a probate and sets down a rule of evidence and forms really a part of procedural requirement of the law of forum. Section 213(2) of the Act indicates that its applicability is limited to cases of persons mentioned therein.

Certain aspects will have to be borne in mind to understand the exact scope of this Section. The bar that is imposed by this Section is only in respect of the establishment of the right as an executor or legatee and not in respect of the establishment of the right in any other capacity. The Section does not prohibit the Will being looked into for purposes other than those mentioned in the Section. The bar to the establishment of the right is only for its establishment in a court of justice and not its being referred to in other proceedings before administrative or other Tribunal. The Section is a bar to everyone claiming under a Will, whether as plaintiff or defendant, if no probate or Letters of Administration is granted. The effect of Section 213(2) of the Act is that the requirement of probate or other representation mentioned in sub section (1) for the purpose of establishing the right as an execution or legatee in a court is made inapplicable in case of a Will made by Mohammedans and in the case of Wills coming under Section 57(c) of the Act. Section 57(c) of the Act applies to all Wills and codocils made by any Hindu, Buddhist, Sikh or Jain, on or after the first day of

January, 1927 which does not relate to immovable property situate within the territory formerly subject to the Lieutenant Governor of Bengal or within the localities of the ordinary civil jurisdiction of the High Courts of Judicature at Madras and Bombay, or in respect of property within those territories. No probate is necessary in the case of Wills by Mohammedans. Now by the Indian Succession (Amendment) Act, 1962, the Section has been made applicable to Will made by Parsi dying after the commencement of the 1962 Act. A combined reading of Sections 213 and 57 of the Act would show that where the parties to the Will are Hidus or the properties in dispute are not in territories falling under Section 57(a) and (b), Sub section (2) of Section 213 of the Act applies and sub section (1) has no application. As a consequence, a probate will not be required to be obtained by a Hindu in respect of a Will made outside those territories or regarding the immovable properties situate outside those territories. The result is that the contention put forth on behalf of the petitioners that Section 213(1) of the Act is applicable only to Christians and

not to any other religion, is not correct".

9. Thus we find that in the judgment which is later in point of time the apex Court has clearly observed that when the Will is executed by Hindu in respect of a property situated outside the original jurisdiction the Civil Jurisdiction of Bombay High Court, it is not necessary to obtain a probate. Similarly the learned Advocate for the plaintiff has also placed reliance on a case of Kantabai Mahipat Sonavane V/s Nimba Onkar Patil reported in 2000(1) Bom. C.R. 417 wherein (Coram:S.B.Mhase,J) held that Section 213 of Indian Succession Act does not apply to the Will made by Hindus unless the same falls within 57(1) and (2) of the Act i.e. property must fall within Original Jurisdiction of High Courts of Mumbai and Madras. In another case Bhagwanji Karsanbhai Rathod V/s Surajmal Anandraj Mehta reported in AIR 2003 Bombay 387 (Coram (A.M.Khanwilkar,J) it has been held that when the property is situated at Pune and Will was also executed in respect of the property at Pune and it was executed by Hindu, it has been held that it is not essential to obtain the probate. The learned Advocate for the Respondents defendants has drawn my attention to a case of Babasaheb Yeshwant Anandrao Patil V/s Smt.Manjulabai Balwant Gaikwad reported in 2001(2) ALL MR 574 (Coral:A.M.Khanwilkar,J) wherein it was observed

that respondent no.1 is not entitled to claim any right on the basis of a will as no probate or letters of administration was obtained. However, it is pertinent to note that facts of the said case and the facts of the case in hand are different. There is nothing on record to indicate that in that matter all essential ingredients of Section 57(1)(c) and 213(2) were complied. So I am of the view that ratio of the said ruling is not applicable to the present suit.

10. In view of the above discussion and in particular the observations made by the apex Court in the Judgment Today 2001(3) SC 82 I have absolutely no hesitation to hold that in the instant case it was not necessary for the plaintiff to obtain probate of the Will. The finding recorded by the first appellate court whereby he held that it was necessary to obtain probate, is not legal and correct, and hence it is necessary to set aside the same. Appeal is allowed and the order passed by the Additional District Judge, Sangli in Regular Civil Appeal No.467 of 1991 is set aside. The matter is remanded to District Court, Sangli for deciding the appeal on merits after taking into consideration the observations made in this judgment, within 6 months from receipt of this order.

Certified copy expedited.

(S.R. SATHE, J.)